

AUG 19 1983

ALEXANDER I. STEVAS,
CLERK

No. 82-2128

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

vs.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY TO
RESPONDENTS' OPPOSITION**

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REPLY TO RESPONDENTS' OPPOSITION

Introduction

This case was tried and decided by the jury on Litton's claim that Bell drove Litton from the relevant markets by making public statements in opposition to a proposal fundamentally to change telephone service by ending exclusive carrier control over signalling functions essential to the operation of the telephone system. The Petition for Certiorari demonstrates that this case presents vitally important questions under the First Amendment and the *Noerr-Pennington* doctrine.

The most striking aspect of Litton's Opposition is that it ignores these First Amendment questions. Litton's counterstatement of the case does not even mention that the FCC initiated an industrywide rulemaking proceeding in 1972 and requested comments in 1973 on whether this "basic and substantial change" in the state-franchised telephone monopolies would be in the public interest. Pet. App. 176a. Instead, Litton baldly asserts (p. 2) that the monopoly over network control signalling equipment had been "illegal" since before 1956—which is to assume away the whole public debate. Litton does not even refer to the First Amendment until page 16 of its Opposition and then it is only to assert that "[t]his is not a First Amendment case."

Litton now claims (pp. 2–22) that its alleged injuries resulted solely from Bell's private decision in 1968 to file the PCA tariff that preserved carrier responsibility over network control signalling equipment, instead of adopting a carrier-administered system of standards for that equipment. Most of the substantive dis-

cussion in Litton's opposition (17-22) is devoted to an issue *not even raised* in the Petition: whether tariff *filings* are protected by *Noerr-Pennington*.

Litton's strategy is transparent and not surprising. It wants to insulate its \$276 million judgment from further review. It believes that the only way to do so is now to portray the case as a routine antitrust case that presents no First Amendment issues.

This Reply is limited to establishing two points. First, this *is* a First Amendment case. Litton cannot now be permitted to walk away from the basis on which it obtained its \$276 million judgment. Second, Litton seeks to defend its judgment by rewriting the regulations that existed at the time of its alleged injury and by ignoring First Amendment principles.

I. This Is A First Amendment Case To Which The *Noerr-Pennington* Doctrine Is Fully Applicable.

Litton admits that there is a conflict among the courts of appeals on the applicability of *Noerr-Pennington* even under its present theory of the case.¹ However, the more basic reason why this *is* a substantial First Amendment case is that it was tried by Litton and decided by the jury under Litton's theory that Bell's public opposition to certification in 1973 drove Litton from the relevant markets and violated the Sherman Act.

Litton's assertion that the judgment rests on the *filing* of the PCA tariff in 1968 flatly misstates the record. The filing of that tariff obviously could not have driven Litton from these markets. Bell's PCA tariffs went beyond any requirement of the then existing regulations by permitting customers, for the first time, to

¹Litton's Opposition acknowledges (20 n.12, 27) that the Second Circuit's holding that *Noerr-Pennington* is inapplicable to advocacy in defense of privately-initiated conduct and in opposition to liberalized entry conflicts with the Fifth Circuit's decision in *Mid-Texas Communications System v. AT&T*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980), and with Judge Harold H. Greene's decision in *United States v. AT&T*, 524 F.2d 1336, 1361-64 (D.D.C. 1981). Litton correctly states (20 n.12) that there was no sham in *Mid-Texas*; the Fifth Circuit's holding thus rested on the threshold question of *Noerr's* applicability.

provide their own telephone instruments when connected through a carrier-supplied PCA that performed the critical network control signalling. Petn. 6-9. It is equally obvious that the only alternative that Bell could have adopted by tariff—a system in which *Bell* evaluated competitors' products under standards which *Bell* established—was wholly untenable both under the antitrust laws and from Litton's vantage point.² The filing of the tariff thus opened up the markets for Litton's entry in 1971, and Litton was very successful in 1972 and early 1973 while the PCA was in effect.³ Indeed, both Litton's business plan and its damages evidence were premised on the basis that the PCA requirement would remain in effect until 1973 and then be replaced by an FCC-administered system of standards. A1555-58, 1625, 6169, 6891.⁴

²This Court's holdings establish that such systems create more anti-trust problems than they solve. See *Radiant Burners, Inc. v. Peoples Gas, Light, & Coke Co.*, 364 U.S. 656 (1961). As the Fourth Circuit held—in language Litton quotes out of context (p. 8)—such “carrier-initiated attestation procedures” are objectionable because they vest carriers with “private lawmaking authority over independent manufacturers.” *North Carolina Utilities Comm. v. FCC*, 552 F.2d 1036, 1051 (4th Cir. 1977). Moreover, if Bell had adopted a carrier-administered system of standards between 1971 and 1974, it would have adopted the National Academy of Science's recommendation that it encompass the installation, maintenance, and manufacturing of equipment—as well as its design. That system would have been far more costly and intrusive than the PCA requirement, as Bell emphasized to the FCC. A13255-84.

³This fact, by itself, refutes Litton's claim (p. 3) that the PCA charges were prohibitive. Litton's assertion (p. 4) that all the other nationwide telephone instrument suppliers were driven from the market is also false. Many suppliers entered the market while the PCA was in effect, thrived in that market, and have remained in it continuously, see, e.g., Tr. 7456-57, 12541-42, 12753, 16830-33, and some *favored* continuation of such hardware protection for the network. *Third Report and Order in Docket 19528*, 67 F.C.C. 2d 1255, 1268 (1978).

⁴The propriety of the finding that the initial filing of the PCA tariff violates the antitrust laws is logically part of any review of this case, however. But the question Bell has raised is *not* whether tariff filings are protected by *Noerr-Pennington*, as Litton erroneously claims (pp. 17-22). It is whether a finding on this issue can rest on the ground that Bell “should have known” in 1968 “that the establishment of stan-
(Footnote continued on next page.)

Under these circumstances, Litton's principal theory at trial was that it was Bell's public announcement of its opposition to certification in John deButt's speech in September, 1973, that drove Litton from the market. App. 21a, 31a. Litton's main witness at trial, its President Fred O'Green, testified that this speech was anticompetitive, that it would slow down or stop the pressure for FCC-administered certification, and that it was the principal cause of Litton's February, 1974, decision to leave this business. A1621-27, 1741-42. Litton's closing argument to the jury asserted that "this speech was taken very seriously throughout the industry and O'Green understood that *it probably would stop the pressure for certification.*" A6170-71 (emphasis added). Litton's claim, in short, was that Bell's advocacy drove it out of business because it influenced public opinion against certification.⁵

It is equally clear that the jury's damages verdict was predicated on its finding that Bell's opposition to certification violated the Sherman Act. The award was entered at a time when the jury had not even decided whether there was anything unlawful about the initial filing of the tariff in 1968. And the award was keyed to the six-year period from 1973 through 1978 when Bell's advocacy allegedly delayed PBX and key system certification—not to the eleven year period when the PCA tariff was in effect. Pet. 16-17.⁶

(Footnote continued from previous page.)

dards was a practical method" of protecting the network, when the PCA tariff not only was a reasonable attempt to comply with, but in fact complied with and went beyond, all existing state and federal regulatory requirements. Petn. 15-16, 27-28. Contrary to Litton's misstatement (p. 29), this claim was presented to the Second Circuit as well as to the trial court. See Brief For Defendants-Appellants in the Court of Appeals, pp. 9-25, 83-87.

⁵Indeed, Litton insisted at trial that its claim that Bell opposed certification in bad faith was entirely distinct from its challenge to the initial filing of the tariff. It thus asked that the two charges be submitted to the jury in *separate* interrogatories, and this request was granted. Tr. 13707-08.

⁶The additional fact that the jury did not increase the award—as it could have—when it belatedly found that the initial filing of the tariff was unlawful demonstrates that the jury found that *all* Litton's injuries flowed from the 1973 opposition to certification. App. 38a n.25.

Noerr-Pennington is therefore fully applicable even under Litton's theory of the doctrine. The judgment rests on a finding that Litton, in its words, was "driven out of business by something AT&T said" and that Litton's "injury flowed" from government inaction and delay that "resulted from [Bell's] efforts to influence" decisionmaking. Opp. 16, 20 n.12. Litton's reliance (27-28) on Judge Harold H. Greene's decision in *United States v. AT&T*, 524 F.Supp. 1336, 1361-64 (D.D.C. 1981), is mystifying. Judge Greene held on the same evidence that Bell's opposition to certification was protected by *Noerr-Pennington* and afforded no basis for antitrust liability.⁷

II. Bell's Opposition To Certification Could Not Be Condemned As A "Sham" Under This Court's Decisions And Those Of Other Courts Of Appeals.

In opposing certification, Bell stated opinions on matters of genuine public importance: the most cost-effective way to protect the network against risks of harm that *all* acknowledged to exist⁸ and the effect of divided ownership of integral parts of the telephone network on its efficiency, on the quality of service, on future innovation, and on residential rates and other economic and social objectives. Numerous disinterested representatives of the public interest made parallel arguments and even found, after hearings, that the PCA was absolutely necessary. See Petn. 8-13. Indeed, the reason NARUC can categorically state, in its amicus brief, that Bell's advocacy was not a sham is that NARUC *led* the opposition to certification on these very grounds.

⁷Judge Greene's further holding (see Opp. 28) that the First Amendment does not protect Bell's failure to *file* a tariff establishing a Bell-administered standards program demonstrates the point Litton made at trial: Bell's filing of its PCA tariff and its subsequent opposition to an FCC-administered certification program raise wholly separate legal issues. See n. 5, *supra*.

⁸See Petn. 25 n.16. Indeed, even Litton's Brief in the Second Circuit (p. 22) admitted that the unlimited interconnection of customer provided equipment risked cross-talk and other harms to the network. Thus, its repeated assertions (*e.g.*, 22-25) that there was no basis for Bell's concerns about network harm and that Bell somehow both misrepresented the facts and concealed the facts are incredible.

The Second Circuit's holding that this reasonable advocacy can be condemned as a sham will inevitably inhibit debate of public affairs, and it flatly conflicts with the standards applied by this Court and other courts of appeals. Petn. 22-27. It rests on two errors.

Erroneous Legal Standard. First, the court refused to assess the speech itself. Instead, it upheld the jury finding on the ground that there was a "version" of the evidence that converted the advocacy into a "sham" by treating statements of opinion as factual misrepresentations,⁹ by drawing adverse inferences from irrelevant conduct,¹⁰ and by outright revisionism of regulatory history.

Litton defends this approach. It asserts (Opp. 25) that the jury "had before it all the pertinent FCC decisions" and other evidence, and that it was for the jury to determine the meaning of the regulatory decisions, decide whether Bell's FCC pleadings violated the "mandate in *Carterfone*," or draw inferences that objectively reasonable positions were "baseless." It argues that the judicial role was properly limited to a determination whether Lit-

⁹The sole basis for Litton's claim (21-24) that Bell misrepresented facts to the FCC is Bell's disclosure and reliance on the "Hunt studies". But this was valuable speech, and Litton does not dispute that the Second Circuit's condemnation of it conflicts with the decisions of the Fifth, Seventh, Eighth, and District of Columbia circuits. See Petn. 24. Furthermore, because Bell's statement of opinion revealed all the "background facts" on which it was based, it could not have misled the FCC or anyone else and is absolutely privileged under any interpretation of the First Amendment. *Ollman v. Evans*, No. 79-2265, Slip. Op. at 21 (D.C. Cir. Aug. 5, 1983).

¹⁰Litton's Opposition illustrates these impermissible inferences. For example, it argues at one point (p. 25) that the minutes of a Tariff Review Group meeting held on July 11, 1968 (A7606-07)—which was only 2 weeks after *Carterfone* and 3½ months before the PCA tariff was filed—show that Bell "knew that standards were the best way to protect the network from harm" and that the PCA tariff was indefensible. But all the minutes say is that "current tariff efforts"—which had begun the previous year—are "not at all responsive to *Carterfone*." Quite apart from the fact that the statements did not refer to the PCA, the draft tariffs in issue were revised substantially before they were filed in late October 1968 and thereafter explicitly held by the FCC to comply with *Carterfone*. App. 166a-167a.

ton's "version" of the evidence supported the verdict, "giving it the benefit of all inferences which the evidence fairly supports, regardless of whether contrary inferences might be drawn." Opp. 23.

That is not the law. An unbroken line of decisions of this Court, which was referred to most recently in *Container Corp. v. Franchise Tax Board*, 51 U.S.L.W. 4987, 4991 n.13 (June 28, 1983), establish that there must be some independent judicial assessment of speech before it can be condemned. A rule that gave the jury such unbridled discretion to engage in post hoc condemnation of reasonable speech on public affairs is abhorrent to the First Amendment. Petn. 22 & nn. 14-15; *New York Times v. Sullivan*, 376 U.S. 254, 385-92 (1965).¹¹ Because the Second Circuit further allowed the jury to decide the meaning of the applicable regulatory decisions, the Second Circuit's approach violates both the principle that regulatory standards are questions of law for the court and the First Amendment. Petn. 25.

False Premise. The Second Circuit compounded its constitutional error by adopting the false premise that Bell's advocacy could be found to have violated the FCC's "mandate in *Carterfone*." App. 51a. Litton seeks to defend this false premise by re-writing the regulations that existed between 1971 and 1974.

Litton starts with the assertion (p. 2) that AT&T had two monopolies—a lawful monopoly over the telephone wires, cables, and switching machines and a second *illegal* monopoly over telephone terminal equipment. This is false. The franchised telephone monopolies were established and defined by state authorities, and continue unless and until preempted by federal authority. It is undisputed—and Litton stipulated to this fact (A4981-87)—that the state authorities uniformly have required telephone compa-

¹¹Litton's sole reliance is on *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962). But when this Court considered the *Noerr-Pennington* issues there, the conduct was assessed independently to assure that it could be condemned without inhibiting public debate. 370 U.S. at 706-08. It was only when this Court reviewed the ordinary jury issues in the case that it applied the standard of viewing the trial evidence in the light most favorable to the prevailing party. 370 U.S. at 696.

nies to own and provide all telephone equipment needed to provide service within their franchised areas, including telephone instruments. See Petn. 4-5; App. 192a. There were at least *six* FCC decisions between 1968 and 1975 that made it explicit that the "mandate in *Carterfone*" did not redefine the state-franchised monopoly and that customers then had no more right to provide their own signalling units than to provide their own "loops, poles, or central office equipment"—"irrespective of whether [the signalling units] are harmless or harmful." Petn. 6-9; App. 166a-167a.¹² For example, the FCC's 1972 *Notice of Inquiry* in Docket 19528 (App. 176a) made it as clear as language can make it that telephone services "have been and are now offered only as complete services that include the offering of the telephone instrument," and that redefinition of the franchises to permit customer-provision of signalling equipment would constitute a "basic and substantial change" in telephone service. The FCC notices sought comments on the profound social, economic, and cost and quality of service issues that that proposal raised—as well as the question whether a standards program would adequately protect the network against harm. App. 176a-186a. Bell's advocacy discussed issues that had not yet been addressed, much less foreclosed.

It was not until 1976—after Litton left the relevant markets—that the FCC was able to resolve the economic and other issues, redefine the franchises to exclude network control signalling, and order that any contrary state laws were preempted.¹³

¹²Litton's reliance (4-5, 26) on the District of Columbia Circuit's opinion in *Hush-A-Phone* is erroneous; it establishes only that customer may attach "devices" (such as plastic cups) to carrier-supplied telephone instruments and thereby "use his telephone in ways that are privately beneficial without being publicly detrimental." *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956).

¹³The Petition demonstrates (12-13) that the FCC delayed its redefinition of the franchised monopolies until it could resolve the economic issues raised by the state commissions as well as by Bell. Litton responds by asserting: "Fact: The economic issues were settled in 1968 *Carterfone* decision" (Opp. 26, n.17). This will come as news to the FCC, which started a separate proceeding in 1974 (Docket 20003) to examine the economic issues arising from a certification program, stated to Congress in 1975 that it was essential that the economic issues be decided before it ruled on certification of PBXs and key systems, and issued a major opinion that addressed these economic issues in 1976. (Petn. 12-13).

Litton places extensive reliance (pp. 7-10, 25-26) on the FCC decisions issued between 1975 and 1978 that rejected the public interest concerns of Bell and the disinterested representatives of the public interest that advocated similar positions.¹⁴ As Judge Greene recognized, the fact that these arguments ultimately were not completely successful is irrelevant; it would seriously inhibit public debate if advocacy is only protected when it succeeds. 524 F.Supp. at 1364. Litton's assertions that these decisions establish that *Carterfone* in fact gave customers the right to substitute "any telephone equipment" unless the carrier first proved it to be harmful cannot be correct: the FCC's regulations, *to this day*, prohibit the interconnection without a PCA of any unregistered PBXs, key systems, or other telephone instruments, whether or not they are harmful. 47 C.F.R. § 68.102 (1983); Petn. 13. The decisive factor, however, is that the reasonableness of Bell's advocacy can only be assessed in light of the state of the law in existence at the time the advocacy occurred, here the period from 1968 to 1973.¹⁵

¹⁴Litton also relies (8-9, 25-26) on several subsequent and irrelevant court of appeals decisions. *North Carolina Utilities Commn. v. FCC*, 552 F.2d 537 (4th Cir. 1977), neither presented nor decided any question about the meaning of the mandate in *Carterfone*. Litton relies on a footnote (*id.* at 1042 n.3) that simply observes that *Carterfone* applied to attachments other than to the *Carterfone* itself. In *Phonetele, Inc. v. AT&T*, 664 F.2d 716 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 785 (1983), the issue was whether Bell's tariff filings were impliedly immune from antitrust scrutiny by virtue of the FCC decisions. The court held that they were not because they put Bell "on notice" that there could be future changes. *Id.* at 730-31. No question was raised as to the protected character of Bell's opposition to future changes.

¹⁵Judge Charles Richey has found that, when Walter Hinchman (see Tr. 1392-1516) was appointed Chief of the FCC's Common Carrier Bureau in 1974, the Staff "abandoned all objectivity" and "launched into a program . . . to create FCC findings that could be used as predicates in antitrust actions against the Bell System." *Southern Pacific Communications Corp. v. AT&T*, 556 F.Supp. 825, 1056-57 (D.D.C. 1983). The mere possibility that the FCC decisions between 1975 and 1978 might themselves have represented such revisionism demonstrates the importance of judging the reasonableness of advocacy in light of the clear regulations that existed when the advocacy occurred.

National Importance. Litton's assertions that this case has no national importance and that the issues it raises will never arise again are startling. The Second Circuit holding is destructive of representative government and will inhibit debate before regulatory agencies. Moreover, the questions presented are issues in 17 pending cases, Petn. p. 28 n.20. And the case will continue to spawn collateral litigation. This is demonstrated by the fact that, *despite* the standards of *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), one court now has given this judgment collateral estoppel effect in a private treble damages action and has certified that question to the Court of Appeals for the District of Columbia. *Jack Faucett Assoc., Inc. v. AT&T*, No. 81-1804 (D.D.C. June 27, 1983).

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